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In The

Supreme Court of the United States

October Term, 1997

WAYNE I. YOSHISATO,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether receipt of prejudicial uncharged "other act" evidence that petitioner penetrated the anal opening of his natural son (Kai) with a foreign object was error and deprived him of a fair trial for the murder of his girlfriend's daughter, within the meaning of the federal due process clause.

2. Whether insufficient evidence was presented to establish that petitioner (rather than Pepper Purvis or Steven Grunbaum) committed the offenses named in the information.

3. Whether erroneous exclusion of evidence of Pepper's true state of mind toward Felicia, and of Steven Grunbaum's prior acts relating to credibility deprived petitioner of the right to present favorable evidence, to cross-examine his accusers and violated his due process right to present evidence in his defense.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, WAYNE I. YOSHISATO, respectfully prays that a writ of certiorari issue to review the decisions of the California Supreme Court and Court of Appeal affirming his convictions for first degree murder, and other related offenses.

OPINION BELOW

The May 23, 1997 opinion of the California Court of Appeal, Fourth Appellate District, Division Three, considered and decided petitioner's direct appeal on the merits. On June 10, 1997 an order modifying the opinion was filed on denial of his Petition for Rehearing. Thereafter the state Supreme Court denied (discretionary) review without an opinion, which had the legal effect of leaving the opinion of the Court of Appeal undisturbed. The order of the Supreme Court and the opinion of the court of appeal as well as the order modifying the opinion are reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). This case comes within that provision because it involves a final judgment rendered by the highest Court of one of the States and because Petitioner's rights under the Constitution of the United States are at issue. A petition for review in the state Supreme

Court was timely filed, and the order denying the petition for review was filed on September 17, 1997. On December 5, 1997, the Honorable Associate Justice of this Court, Sandra Day O'Connor, granted Petitioner's application for an extension of time to file this Petition to and including January 15, 1998. This petition is timely filed pursuant to Rule 13.4 of the Supreme Court rules.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves four issues which implicate the due process clause of the Fourteenth Amendment to the United States Constitution and Sixth Amendment rights of the criminal defendant to present his defense and to confront and cross-examine the evidence on which a conviction is based.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW AND SUMMARY OF ARGUMENT

Petitioner was tried for the murder of an infant, the child of his live-in girlfriend. That child, Felicia Grunbaum, was severely spanked and shaken by her young mother and her body bore marks of injuries of varying degree and varying ages when she died.

The state's expert testified that the cause of death was shaking, causing serious injury to, and swelling of, the brain. Other injuries included multiple bruising on her face, head, back and buttocks, which were from 0-12

hours old, up to and/or 12 hours to 12 days old, and older. Also, there was evidence of recent and chronic anal and vaginal scarring and tearing.

Only petitioner was charged with or tried for the death of Felicia. Felicia's mother is Pepper (Grunbaum) Purvis. Her father is Steve Grunbaum. They separated, and Pepper lived with petitioner, Wayne Yoshisato, and Felicia, and two other roommates. Appellant was 26 years old in July, 1990 when Felicia died.

Felicia spent the last days of her life being shuttled from her mother's residence, to her father's, and back to her mother's. The age of some of the serious bruising, and anal and vaginal injuries were consistent with the time she spent with her natural father as well as with Petitioner and Pepper.

On appeal Petitioner argued that the evidence failed to satisfy the due process test for substantial evidence to connect petitioner to the crime, under *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed.2d 560, 573, 99 S.Ct. 2781 (1979). This contention was based in part on the fact that the prosecution presented two conflicting experts to offer their opinions on the cause of death. One thought the baby died at the time trauma was inflicted, the other thought she died from gradual swelling of the brain many hours later. Since Petitioner (as well as other suspects) had limited access to the child, the time of the infliction of the death-producing trauma was critical to establishing the identity of the killer. Since the child's natural mother (who had admitted to shaking the child, and inflicting other trauma on her) had access to the child during relevant periods, and since the child's natural

father had access to the child during relevant periods, as well, the evidence failed to show that Petitioner was the perpetrator, *or* that the killer, whomever that may be, intended to kill. If the injuries that caused death did so, as one expert testified, gradually, as the result of imperceptible swelling, there would be little reason to believe the person inflicting that type of trauma was trying to kill the child or was aware death would result. On the other hand, if death was from blunt force trauma to the head, a stronger case of intent might be made.

Petitioner also argued that: (a) the evidence was insufficient to convict or instruct on the theory of wilful, deliberate, premeditated first degree murder; or (b) murder by torture and that reversal of the first degree murder conviction was required under both *Jackson, supra,* and the test of *Griffin v. United States,* 502 U.S. ___, 116 L.Ed.2d 371, 112 S.Ct. 466 (1991).[1]

Additionally, petitioner argued that there was insufficient evidence of the charged felony counts of child molest or of felony first degree murder, an alternative theory also presented to the jury in the instructions. The underlying felony counts had been dismissed twice prior to the trial, and a "special circumstance" allegation of murder during the commission of child molest was also dismissed for lack of evidence.

The evidence Petitioner was the person who inflicted injuries consistent with child molest was extraordinarily

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[1] The verdict did not specify the theory on which the jury reached a first degree murder conclusion, but the prosecutor argued that this was a case of torture murder.

weak, contradictory, and not supported by any physical evidence or eyewitness.

Nevertheless, this aspect of the case was probably the most prejudicial, because the People were permitted, over strenuous objections, to introduce unadjudicated allegations that Petitioner had at another time in another place molested his own natural son. This evidence had little if anything to do with determining the identity of the killer, and it was, itself, highly questionable. Nevertheless, the People were able to field a forensic expert who opined that although minimal, there was physical evidence consistent with anal penetration of petitioner's son (who did not reside with Petitioner) inflicted in a time frame consistent with times Petitioner had access to his son.

Petitioner seeks a Writ of Certiorari in this case, in part to establish the federal due process standard for admitting or excluding so-called "other bad act" evidence where, as here, the other act is unadjudicated, is itself of highly questionable validity, and is an extremely emotional and prejudicial allegation which is only marginally relevant, if at all, to the issues in the trial.

In view of the fact that California has abandoned any meaningful limitation on the use of propensity and bad character evidence in the form of alleged other acts, Petitioner will seek this Court's writ to establish the due process limitations on the use of such evidence.[2]

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[2] In the present case the Court of Appeal completely abdicated any form of due process review. In its original opinion, it said, in a footnote, "because . . . [the other act molestation evidence] was relevant and material . . . Yoshisato's

Finally, evidentiary errors which rose to the level of constitutional violations included denial of the right of Petitioner to present his defense – that the child's natural parents were the more likely perpetrators of the crimes against her – and the denial of the right to confront and cross-examine two critical prosecution witnesses. The net effect of these violations was to leave the jury with an extraordinarily skewed view of the facts. The Court allowed evidence against Petitioner which could have been discredited had proper cross-examination and impeachment been permitted, and the court disallowed properly admissible evidence that would have pointed to the victim's mother or father as the more likely suspects than Petitioner.

The Court of Appeal rejected each of Petitioner's federal constitutional arguments raised on appeal, in an unpublished opinion, which it modified only in relation to a due process issue it completely ignored originally.

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final contention of a due process denial need not be addressed." (Fn. 9, p. 15, Opinion). Then, when it was pointed out on Petition for Rehearing that the due process clause can be violated even if the evidence is admissible under state rules, the Court filed a modification of the opinion stating: "[Since] the trial court here determined that the other crimes evidence was *not* unduly prejudicial when it conducted its weighing under Evidence Code section 352, . . . the fear the evidence was so prejudicial as to render the trial fundamentally unfair is unfounded." (Modification of Opinion, p. 2). Of course this view means the Court of Appeal never even considered petitioner's argument that the evidence was, indeed, *that* prejudicial, and that the trial court erred in its finding.

Thereafter, Petitioner filed a timely petition for discretionary review in the California Supreme Court which was also denied.

REASONS FOR GRANTING THE WRIT

Receipt of prejudicial uncharged "other act" evidence that petitioner penetrated the anal opening of his natural son (Kai) with a foreign object was error and deprived him of a fair trial within the meaning of the federal due process clause.

Certiorari should be granted to establish the due process test for admitting or excluding unadjudicated "other act" evidence.

Petitioner was prejudiced by the improper receipt of evidence in the form of the opinion of Dr. Stewart, that he penetrated the anal opening of his natural 3 year old son, Kai Yoshisato, during the same general period of time that he was accused of penetration with a foreign object of the anal and vaginal openings of the deceased herein, Felicia.

After admitting this evidence, the trial court gave a pattern jury instruction which informs the jury they must only consider such evidence to determine if it tends to show:

> "A characteristic method, plan, or scheme in the commission of criminal acts similar to the method, plan, or scheme used in the commission of the offense in this case which would further tend to show a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if

> the defendant committed the other offense defendant also committed the crime charged in this case."

Based on *People v. Ewoldt*, 7 Cal. 4th 380 (1994) and *People v. Balcom*, 7 Cal. 4th 414 (1994) the state courts each concluded the other act evidence was admissible to prove a "common plan, scheme or design" and identity of petitioner as the killer, and the one who penetrated Felicia.

Petitioner submits the evidence was not sufficiently similar to permit its admission on a common scheme and design theory, and further, that if the California test for admission of such evidence *does* allow this evidence in, generally, it violated due process for the trial court to admit it in this particular case.

The alleged insertion of a foreign object into the anal opening of Kai did not result in either a relaxed muscle or of a spasm reaction according to Dr. Stewart, while evidence of chronic activity was present in Felicia according to Dr. Halka.

Furthermore, the People contended that the penetration of Felicia was done for the purpose of causing pain, while there is virtually no evidence of any particular motive with regard to Kai. Also, there is virtually nothing similar in the relationships between petitioner and his son Kai, and petitioner and Felicia. Moreover, it was alleged that petitioner hated Felicia, but loved Kai.

Finally, the Kai evidence did nothing to establish either the identity of the person that penetrated the anal and vaginal openings of Felicia, or the identity of her killer. Nothing about the single fissure (healed tear) on the anal opening of Kai suggests that whoever did it

would be likely to want to penetrate the openings of a 14 month old Felicia, nor would it suggest a desire to kill or torture a baby.

In fact, notwithstanding the Prosecutor's argument to the jury that these two anal injuries (Kai's and Felicia's) were identical, the testimony of Dr. Stewart actually established substantial differences, in terms of (a) the number and severity of the injuries to Felicia, (b) the alleged motive for the conduct, and (c) the relationship between petitioner and each child.

The sole similarity, on the other hand, was merely a general physical similarity that would be present in any young child with a tear to the anal opening, *regardless of the cause.*

The prejudice flowing from the introduction of this evidence was heightened in this case because the evidence that petitioner was indeed responsible for the injury to Kai was so speculative that the two charges originally included in the information alleging those acts were dismissed by the trial court before trial.

The differences between the charged and uncharged acts are, at least:

1. The status of the relationship between petitioner and Kai was different than the status of his relationship with Felicia at the time of the alleged act(s).

2. The opportunity of petitioner to be the person that caused the injuries to the two was different.

3. The alleged motive of causing the injury to the two children is far different.

4. The unadjudicated nature of the Kai allegation was far more likely to make its receipt in evidence prejudicial.

Where, as here, irrelevant and prejudicial "other act" evidence is improperly admitted in a case that is not an overwhelming or "weighty" one, the result violates due process in one of two ways. Federal due process is violated if evidence is received in violation of state rules where the evidence is likely to have gone to the heart of the case and deprived petitioner of a fair trial. At least one circuit court has also held that federal due process is violated even if other act evidence is admitted properly under the state rules of evidence, if the evidence fails to meet the federal test of probativeness, and is sufficiently prejudicial to have infected the fairness of the trial.

This issue is discussed in the Ninth Circuit cases of *Jammal v. Van De Kamp*, 926 F.2d 918 (9th Cir. 1981); *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993); and *Henry v. Estelle*, 993 F.2d 1423 (9th Cir. 1993), but California appellate courts consistently reject without serious consideration to any due process arguments regarding "other acts" since the state Supreme Court decision in *People v. Ewoldt*, 7 Cal. 4th 380 (1994) which effectively eviscerated the state evidence rule precluding the use of other bad acts unless there is a high degree of similarity between the charged crime and the alleged other act, *and* it was relevant to some issue in the case. In the place of these requirements, *Ewoldt* substituted a "common plan or scheme" test which is, effectively, a "disposition to commit this type of crime" test which Petitioner believes, itself, violates due process.

In *Jammal v. Van De Kamp, supra,* 926 F.2d 918, the Ninth Circuit acknowledged that admission of "other act" evidence could violate federal due process, whether or not it was properly admitted under state rules of evidence.[3]

The Court went on to hold that admission of other act evidence will not violate due process unless "there are *no* permissible inferences the jury may draw from the evidence." (*Id.,* at p. 920).[4]

The present case is unlike *Jammal, supra,* because there the evidence supported at least one *permissible* inference – that because the defendant had a large quantity of cash in his trunk on one occasion, he was more likely to have the cash in his trunk on the day in question, on which he was charged with possession of the drugs found with the money in the trunk.[5] Here, on the other hand, while the prosecutor claimed the Kai evidence helped the jury determine the identity of the person that molested and therefore killed Felicia, she never articulated *how* it

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[3] "[S]tate procedural and evidentiary rules may countenance processes that do not comport with fundamental fairness. *See Perry v. Rushen,* 713 F.2d 1447, 1453 (9th Cir. 1983) ('Due process draws a boundary beyond which state rules cannot stray.'), *cert. denied,* 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984)." 926 F.2d at p. 919.

[4] The Court also cited *Kealohapaooule v. Shimoda,* 800 F.2d 1463, 1465-1466, *cert. denied,* 479 U.S. 1068, 107 S.Ct. 958, 93 L.Ed.2d 1006 (1987) for the proposition that even then the evidence must be of such a quality that it prevents a fair trial, quoting *Lisenba v. California,* 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941).

[5] See 925 F.2d at p. 920.

was probative of any of the elements of the crimes charged.

Rather, this case is more similar to *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993) where the court held California's admission of prior bad act evidence violated due process. In that case, the contested evidence related to prior instances that the defendant used a knife. The Circuit court carefully considered whether any of that evidence "were evidence from which inferences relevant to any fact of consequence may have been drawn." (993 F.2d at p. 1382). The Court concluded that "much of the disputed other act evidence [was] probative only of character and, thus, [was] irrelevant." (*Id.*, at p. 1384).

The Court quoted from both *Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)[6] and *Michelson v. United States*, 335 U.S. 469, 475-476, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948)[7] and concluded the evidence

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[6] Stating that due process is violated if the action complained of "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." (493 U.S. at 353, 110 S.Ct. at 674) (internal quotation marks and citations omitted).

[7] "The inquiry [into defendant's evil character, prior trouble with the law, specific criminal acts, or ill name among his neighbors] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

It may be noted that *Michelson* was cited with approval where this Court shared "concerns that unduly prejudicial evidence

was prejudicial, "emotionally charged", "served to prey on the emotions of the jury" and that the case was not a weighty one, but one of credibility. *McKinney v. Rees*, 993 F.2d 1378, 1386. (See also *Henry v. Estelle*, 993 F.2d 1423 (9th Cir. 1993)).

Here, of course, the error in admitting the prejudicial other act evidence was critical to the jury's evaluation of petitioner's credibility and was likely to tip the scales in favor of a guilty verdict.

In *McKinney v. Rees, supra*, 993 F.3d 1378, *cert. denied* ___ U.S. ___, 126 L.Ed.2d 586, 114 S.Ct. 622, the Court considered whether the state court's admission of "other act" evidence violated due process, on remand for reconsideration in light of the United States Supreme Court decision in *Estelle v. McGuire*, 502 U.S. ___, 116 L.Ed.2d 385, 112 S.Ct. 475 (1991). The Court in *McKinney* concluded that it *did* violate due process, and affirmed the issuance of a writ of habeas corpus to invalidate the state conviction, stating that the "other act evidence" was:

> "just the sort of evidence likely to have a strong impact on the minds of the jurors. [It] was not cumulative or insignificant. . . . Nor was the evidence against McKinney 'weighty' as discussed above. * * * [W]e think it is 'highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict.' *Kotteakos*, 328 U.S. at 776, 66 S.Ct. at 1253.

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might be introduced under" a federal rule similar to California's Evidence Code § 1101(b). *Huddleston v. United States*, 485 U.S. 681, 691, 99 L.Ed.2d 771, 783, 108 S.Ct. 1496 (1988). That was prior to the decision in *People v. Ewoldt, supra*, which has further relaxed the Section 1101(b) rule.

The Court also cited *Henry v. Estelle*, 993 F.2d 1423 (9th Cir. 1993) [mod. (9th Cir. 1994) 33 F.3d 1037], *reversed on other grounds sub nom. Duncan v. Henry*, ___ U.S. ___, 130 L.Ed.2d 865, 115 S.Ct. 887 (1995), as "consistent" with its analysis there.

In *Henry, supra,* the Court held the evidence of uncharged other acts (a remote child molest allegation, in a child molest prosecution) together with the same pattern instruction given here violated due process and required a new trial. (933 F.2d at 1427-1428; 33 F.3d at 1042-1043). The Court also distinguished the situation there from the facts in *McGuire,* since in *Henry,* the other act "testimony did not tend to make any of the elements of the charged offense more likely." (933 F.2d at 1427, fn. 3, 33 F.3d at 1042, fn. 2)

The same analysis is appropriate here and Petitioner urges this court to adopt the "other act" due process holding of *Henry*. The introduction of the Kai other act evidence "did not tend to make any of the elements of the charged offense more likely." Moreover, that evidence was precisely the type to persuade the jury to convict on the basis of a vague propensity theory in light of the language of the pattern instruction given in this case.

It was error to admit the Kai other act evidence and the prejudicial impact of that evidence substantially outweighed any probative value it might have. Under the circumstance of this case, even if it was admissible under state law, the receipt of the Kai evidence violated federal due process and deprived petitioner of a fair trial. There is a grave danger that the jury convicted him of the

charged crimes against Felicia as the result of the improper admission of this uncharged other act evidence.

Insufficient evidence was presented to establish that petitioner (rather than Pepper Purvis or Steven Grunbaum) committed the offenses named in the information.

To be sufficient to satisfy the due process clause, evidence must be "of solid value" and such that a reasonable jury could have concluded that petitioner was guilty beyond a reasonable doubt. (*Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed.2d 560, 573, 99 S.Ct. 2781 (1979).

Although every reasonable inference that may be drawn from the evidence in favor of the verdict of guilty must be drawn in reviewing the sufficiency of the evidence, the evidence is not viewed in a vacuum, and to support a conviction there must be evidence "of solid value" that *reasonably* supports an inference of guilt.

In the present case the evidence completely fails to show with any degree of certainty (a) the cause of death [since the two pathologists called by the People disagree]; (b) the *time* of the infliction of the injuries causing death [the evidence ranges from 20-30 minutes before Felicia lost consciousness [Fukumoto] to 0-12 hours before death [Halka] to a combination or series of traumas, which lasted over a 12 day period, and had the cumulative effect of making the victim more susceptible to each new trauma [Halka, Fukumoto]; (c) whether or not petitioner had an opportunity, and whether or not he had the best opportunity, when compared to that of Steven Grunbaum [who had possession and control of Felicia from 7 hours

to 2 days before her death], or Pepper [who had joint access to, and at times exclusive access and control of her during the last 12 days, and who admitted slapping, severely spanking, and hitting Felicia over that time, and when she returned from Steven Grunbaum's visit]; (d) whether or not petitioner had a motive, or the superior motive to either inflict injury on [Counts 2-6], or kill [Count 1] Felicia, in light of the antecedent statements of Pepper [that she preferred time without Felicia, that she thought she was a brat, that petitioner should go ahead and drown her, etc.], and in light of the prevarications of Steven Grunbaum [regarding his jealousy, and hatred toward petitioner for "taking his place" in Felicia's life, and the proximity of his possession of her to the appearance of injuries related to her death.]

Dr. Halka, called by the People, opined that while Felicia ate approximately 8 hours before her death, her digestion of that food was arrested within two to three hours after she ate by the swelling of her brain. This means the swelling occurred at least 5 hours before her death, which precludes the injury that caused the swelling (and therefore the death) during the time that petitioner was alone with Felicia that evening.

For these reasons no substantial evidence was presented to establish petitioner's guilt beyond a reasonable doubt as to any of the (related) counts on which he was convicted, and due process requires the judgment of conviction be vacated.

Erroneous exclusion of evidence of Pepper's true state of mind toward Felicia, and of Steven Grunbaum's prior acts relating to credibility deprived petitioner of the right to present favorable evidence, to cross-examine his accusers and violated his due process right to present evidence in his defense.

Petitioner sought to introduce evidence relating to the credibility of Felicia's father, Steven Grunbaum, including: (a) his motive to lie [that if the verdict did not come out guilty, he would injure or kill petitioner and his counsel]; (b) his prior drug use; (c) his actual demeanor and state of mind with respect to petitioner and Felicia during the last 30 days of her life. This evidence was excluded by the trial court as irrelevant or under Section 352 of the Evidence Code,[8] although it was not cumulative of any other evidence.

Similarly, the Court excluded evidence tending to show Pepper Purvis' true attitude toward her daughter, in the form of (a) her own statements tending to show her mistreatment of Felicia was an ongoing pattern, not isolated "spanking" incidents as she portrayed it; (b) her maternal instincts were either weak or non-existent; (c) her emotional reaction to Felicia's death was inappropriate for a mother that loved her baby [she did not cry or even appear sad at Felicia's funeral.]

These items of evidence were offered to raise a reasonable doubt by showing that another person (other than petitioner) was as likely to have been responsible for

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[8] On grounds it was less probative than prejudicial or consumptive of time. Section 352 of the California Evidence Code is similar to Rule 403 of the Federal Rules of Evidence.

the injuries to and death of Felicia, and to place the credibility of both Steven Grunbaum and Pepper in its true light. Defense counsel made a offer of proof that petitioner observed a series of injuries on Felicia, and that he spoke to Pepper about the injuries, and she made statements inculpating herself. The Court declined to allow this impeachment of Pepper on the People's objection.

The trial court excluded each of these items on both relevance and § 352 grounds after hearing a specific offer of proof.

A defendant has an absolute right to present relevant evidence with respect to an element of the offense charged or a defense thereto. *Rock v. Arkansas*, 483 U.S. 44, 55-56, 93 L.Ed.2d 37 (1987).[9] In any system of ordered liberty, a defendant must have the right to have the jury consider any competent evidence offered to disprove the charges. Our traditional notions of fair play require no less. *McMillian v. Pennsylvania*, 447 U.S. 79, 85, 91 L.Ed.2d 67 (1986).

The federal constitutional right to compulsory process, and to counsel, encompasses more than the empty right to summon a witness to court, or to have an attorney at the side of the accused. Rather, these rights include meaningful guarantees of an opportunity to present a defense and to place before the jury the defendant's view of the case.

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[9] This constitutional right to present evidence even triumphs over contrary state rules of exclusion. (at p. 55-56).

In *Washington v. Texas*, 388 U.S. 14, 18 L.Ed.2d 1019, 87 S.Ct. 1920 (1967), for example, the Court considered whether the Sixth Amendment right of compulsory process applied to state criminal trials through the Fourteenth Amendment due process clause. The Court reviewed its decision in *In re Oliver*, 333 U.S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1948), where it was said that the defendant's due process right to "an opportunity to be heard in his defense – [AND] a right to his day in court – are basic in our system of jurisprudence." *Washington v. Texas, supra*, 388 U.S. at 19, 18 L.Ed.2d at 1023.

The due process right to present evidence was held to be violated by a state rule of evidence that excluded the testimony of an accomplice for the defendant. It is significant that the principle focus of this Court in the above quoted passage was the right of the accused to present his version of the case to the jury, and the right of the defense to employ his constitutional protections to challenge the prosecution witnesses' testimony, so the *jury* "may decide where the truth lies."

Obviously, here petitioner was seeking to present to the jury his version of the case, and principally, to challenge Pepper's testimony and show reasons she was not credible, and her motives for making a false accusation, precisely so the jury could decide where the truth of this case lies. The trial court's exclusion of the above mentioned evidence prevented petitioner from doing so, and deprived him of his due process right to present a defense, to present evidence, to have his day in court and to a fair trial. See also *Crane v. Kentucky*, 476 U.S. 683, 90 L.Ed.2d 636, 106 S.Ct. 2142 (1986); *Pennsylvania v. Ritchie*,

480 U.S. 39, 94 L.Ed.2d 40, 107 S.Ct. 989 (1987);[10] and *Rock v. Arkansas, supra,* 483 U.S. 44, 55-56, 97 L.Ed.2d 37, 48-49, 107 S.Ct. 2704.

In *Pennsylvania v. Ritchie, supra,* 480 U.S. 39, 94 L.Ed.2d 40, 107 S.Ct. 989, the Court explained that it has "articulated some of the specific rights secured by this part [the Compulsory Process Clause] of the Sixth Amendment."

> "Our cases establish, at a minimum, that criminal defendants have the right * * * to put before a jury evidence that might influence the determination of guilt." 480 U.S. at 56, 94 L.Ed.2d at 56 (Footnote omitted).

It is apparent, then, that when the credibility of critical witnesses, such as Felicia's mother (Pepper) and father (Steven Grunbaum), is a central issue before the jury, as it was in the instant case, the trial court violates petitioner's Sixth Amendment and Due Process rights discussed above by excluding evidence bearing on the credibility of the witness that is central to the People's case. For it is the jury, not the trial judge, that must be permitted to judge the weight and credibility of the evidence both for and against the defendant.[11] (*Crane v. Kentucky, supra.*)

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[10] " . . . defendant was denied the right to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." (quoting from *Davis v. Alaska,* 415 U.S. 308, at 318, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974). 480 U.S. at 54, 94 L.Ed.2d at 55.

[11] Cf. *Washington v. Texas, supra,* 388 U.S. at 22, 18 L.Ed.2d at 1024. [Jury is to be permitted to determine the "weight and credibility" of testimony of all of the witnesses]

And, in *United States v. Bagley*, 473 U.S. 667, 677, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985) the Court noted that a defendant is deprived of due process when prevented from presenting evidence on credibility where the "reliability of a given witness may well be determinative of guilt or innocence."

Applying these constitutional principles to the instant case, it is clear petitioner was entitled to present the above mentioned excluded critical evidence which he proffered. The credibility of Pepper was likely determinative of guilt since the prosecutor told the jury that the reason petitioner was guilty was that he lied, and she relied on testimony of Pepper in pressing that claim.

This rule, which embodies the right of a defendant to pursue a theory of the case and raise a reasonable doubt, is so important that courts are instructed to permit defense theory evidence even if it would complicate the trial.

Here, the prime theory of the defense was that Pepper, not petitioner, was the person responsible for the injuries and death of Felicia. But the exclusion of the evidence that put her in a true light deprived petitioner of a fair trial because the jury was never able to hear all the evidence of her credibility, and her attitude and actions toward Felicia, in order to weigh that theory. Exclusion of this evidence violated due process (as discussed above), and the refusal to allow cross-examination on the point violated petitioner's right of confrontation. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct.

1065 (1968). The right is violated when the trial court restricts the ability of the defendant to impeach the witnesses against him with relevant evidence that may tend to cast doubt upon their credibility. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Olden v. Kentucky*, ___ U.S. ___, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988).

Olden v. Kentucky, supra, requires reversal in the present case. There, as here, credibility in a kidnap, rape and sodomy trial was the only crucial issue in the case. There, as here, the case was far from overwhelming. There, as here, the trial judge purported to exclude evidence on cross-examination on the basis of a balancing of the potential prejudicial impact against the probative value of the evidence. Finally, there the court excluded, on cross-examination, evidence with a strong potential for demonstrating the woman's reason for making a false accusation of rape.

This constitutional error requires reversal since the denial to the defendant of the right to impeach Pepper and Steven Grunbaum, and to present evidence tending to show that one or both of them also had an opportunity and/or motive to inflict injury on Felicia, deprived petitioner of a fair trial.

The exclusion of virtually all of petitioner's proffered evidence designed to either impeach or cast doubt on the credibility of Pepper and Steven Grunbaum and designed to circumstantially support the credibility of petitioner deprived him of a fair trial and denied him the specific constitutional rights to present a defense, to have the jury

evaluate the weight and credibility of the evidence, and to determine the merits of both the state's and petitioner's case.

CONCLUSION

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the state Court of Appeal affirming Petitioner's conviction.

WHEREFORE, Petitioner prays that this Honorable Court grant this Petition and issue its Writ of Certiorari.

Respectfully submitted this 15th day of January, 1998.

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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WAYNE ICHIJI YOSHISATO, Defendant and Appellant.	G016761 (Super. Ct. No. C83329) OPINION (Filed May 23, 1997)

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

William J. Kopeny, Stokke & Riddet, William J. Kopeny and Allan H. Stokke for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Garrett Beaumont and Vincent L. Rabago, Deputy Attorneys General, for Plaintiff and Respondent.

Wayne I. Yoshisato appeals from the judgment sending him to prison for 28 years plus an indeterminate term of 25 years to life, following his conviction for the first degree murder of a 13-month-old baby girl, Felicia G. He

makes a series of contentions: (1) The evidence was insufficient to identify him as the perpetrator; (2) evidence of another sexual offense by Yoshisato was impermissibly admitted; (3) evidence of motive harbored by others was impermissibly excluded; (4) other evidentiary errors, when taken together, harmed him; and (5) the trial court erred in its jury instructions. We affirm.

FACTS

Little Felicia G. died at the hands of someone who beat, shook and sexually tortured her to death. She was 13 months old and lived with her mother and her mother's boyfriend, Yoshisato. Although the medical testimony described her injuries in graphic detail, it is sufficient to say that she died from a combination of blunt force trauma wounds and severe shaking which resulted in cardiorespiratory failure; the brain was so injured that all vital functions ceased. In addition, her anus and vaginal areas were so violated that the emergency room nurse said that she had "never seen anything that bad in [her] life." Bruises ran down her spine, all over her head, her thorax, her chin, her eyes and both buttocks; and a large, soft "squishy" lump protruded from the base of her skull where she had recently been struck.

The injuries were both old and new; some were inflicted within three-to-five days of death, while others were within 12 hours. The most recent shaking incident occurred *after* the child ate, and within 20-to-30 minutes of her last loss of consciousness, which happened between 8 p.m. and 9 p.m. on Monday, July 9, 1990. Paramedics were called to the home at approximately

three o'clock the next morning, but no heart activity could be found, and the doctor pronounced Felicia dead at 4:02 a.m. The sole person alone with Felicia during this period was Yoshisato.

The child's 19-year-old mother, Pepper Purvis, left the baby alone with Yoshisato at about 8 that evening, after she had fed the baby. She left to get some dinner for herself and Yoshisato. When she returned about an hour later, the child was in her crib, and Yoshisato told her that Felicia had passed out. The same thing had happened about four days before, likewise after Yoshisato had been alone with the child. He had taken the child out of her high chair and into the bathroom to clean her up after she had vomited. Furious because of the mess, he slammed the bathroom door behind him and remained there alone with the child for somewhere between 20 and 60 minutes. When he entered the room with her, she was crying. When he emerged, she was unconscious, and Yoshisato informed Pepper that she had "passed out." Between Thursday and the following Monday, Felicia repeatedly vomited; but she only lost consciousness when she was alone with Yoshisato.

About two weeks before, Felicia visited her maternal grandmother for a few days. She returned home for three days before visiting her paternal aunt, Edie G., on Saturday and Sunday. While bathing Felicia and changing her diaper, Edie noticed that the child's vaginal area was red and abraded, but not in the manner of diaper rash. When Edie tried treating the area with ointment, the little girl stiffened in pain. The redness diminished with the treatment, but the abrasion remained; the skin was raw. Edie returned the child to Pepper on Sunday, July 1.

Felicia remained with Pepper and Yoshisato[1] for that week. That Friday, Felicia started vomiting, and she passed out for the first time while Yoshisato had her in the back bathroom, supposedly cleaning her up. After she was revived, she threw up again, and Pepper called the doctor to make an appointment for him to see her. It was set for Monday at 4 p.m. Pepper then left the baby alone with Yoshisato to go to a welfare office appointment. When she returned, the child appeared asleep on the bed with Yoshisato, who was watching television.

That night, Ruel Flores, the owner of the auto upholstery shop in which Yoshisato formerly worked, came for dinner along with his wife and daughter. Upon seeing Felicia, Flores thought she was quite ill. He also noticed that the child appeared afraid of Yoshisato, but not of Pepper. During the course of the evening, Yoshisato told Flores that he hated the baby for crying all the time; he added in a hushed tone that he "might kill her." At first, Flores thought he must be joking, and explained to Yoshisato that a baby cries when she needs or wants something. Flores suggested he show the child love and attention, instead of making faces at her to scare her. Flores started playing with the girl, and Felicia warmed to him: She stopped crying, smiled and let him hold her. Flores felt that he had shown Yoshisato how to be a better

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[1] Neither Yoshisato nor Pepper were employed during this time. Pepper previously worked for Newberry's, but resigned before moving in with Yoshisato at the end of May 1990. Yoshisato worked for an auto upholstery shop in the most recent past, and was attempting to regain that employment, but spent most of the time at the house with Pepper and Felicia.

parent and calm the child. Yoshisato's response was decidedly cool.

On Sunday, Pepper called Felicia's father, Steve G., and asked him to pick her up for visitation; he had not seen her for about a month. Before Pepper moved in with Yoshisato, he had seen the child every two weeks and always found the child happy, healthy and outgoing.[2] On this occasion, Felicia greeted her father eagerly, but throughout the visit, seemed not as happy as in the past, was very quiet and clung to him. Pepper informed him that the little girl was vomiting, so it did not surprise him that the child had no appetite that evening. During the night, the child woke up twice, vomiting each time. The next day, she played quietly and watched television, but was sick again en route to the doctor's office. Steve removed her shirt because of the mess, and neither Steve nor the doctor's staff noticed any bruises on her back, face or abdomen.[3] Unfortunately, the doctor was unable to see the child at the scheduled time, and after waiting about an hour, Steve reset the appointment for Wednesday.

Steve returned Felicia to Pepper that night. Yoshisato was in the bedroom, watching television. Felicia started crying as her father was leaving; Pepper calmed her down, but as soon as she took Felicia into the bedroom

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[2] Moreover, Felicia's pediatrician, Dr. Lutsky, regularly examined her from May until June 7, 1990, and no signs of physical or sexual abuse were observed.

[3] Steve noticed a small bruise on her back during Felicia's bath, as well as a bruise on her buttocks but was unconcerned about them as they were very minor.

with her, the baby began crying anew. Pepper, exasperated with her crying, removed her diaper and spanked her, but this only fueled her crying. Yoshisato could not stand the crying any more. He picked up the baby, shook her repeatedly and threw her into the crib with enough force to slam it against the wall, cracking one of its legs. Upon mending the leg with tape, Yoshisato stormed out of the house.

Pepper took Felicia into the kitchen to feed her dinner. She calmed down and played for awhile. Yoshisato returned about 20 minutes later, going into the bedroom to watch television. Pepper picked up the baby and followed him into the room. The two adults quarreled because each of them wanted the other to go get something for dinner. Pepper gave in and left to go to Taco Bell. The child immediately began to cry, but Pepper left her behind with Yoshisato.

Yoshisato's two roommates, Jim Kane and Brent Holland, heard Pepper leave. Following her departure, they overheard little Felicia's cries through Yoshisato's closed bedroom door and their closed doors. They heard the cries increase after Pepper's departure, followed by a long series of slapping sounds and Yoshisato's scream: "Do you want more?" Felicia's only response was a choking or gagging sound and then all went strangely quiet.[4]

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[4] Jim Kane further testified that, in his opinion, little Felicia was abused but he was unsure by whom. However, after Yoshisato was arrested, he was approached by his landlady, Yoshisato's mother, who tried to get him to blame someone else for the injuries. She attempted to persuade him that he had seen Pepper yank Felicia's arm so hard that it almost came out of the socket; he refused because nothing like that had ever happened.

When Pepper returned a few minutes, later, the child appeared asleep in the crib, and Yoshisato told her Felicia had passed out again. Pepper look at her; she was breathing. It was 8:55 p.m. About midnight, Pepper checked on her again. The baby still appeared unconscious so she picked up the child, leaned her against Yoshisato's bent knees and tried tickling Felicia's feet. There was no response.

Yoshisato carried the baby into the bathroom and began wiping her down with a cold, wet washcloth to revive her. Pepper said she was worried, but Yoshisato told her the child of some friends of his would often hold his breath until he passed out just to get his way. He assured her that she would come around when she really wanted to. Pepper went to bed, leaving the baby in his care. About an hour later, Pepper was awakened by the sound of Yoshisato's screaming into the telephone; he ordered her to get up, go outside and wait for the paramedics to arrive. He appeared to be trying to resuscitate Felicia. When the paramedics arrived, they barred her from touching the baby, and Pepper became frightened.

Yoshisato was married to Anna Rhoads Yoshisato, and they had a little boy, Kai. Yoshisato and Anna had separated early in 1990 with Anna leaving for Illinois with her new boyfriend and the boy. Yoshisato was very depressed and asked his friends, Dean and Casey Shimabukuru, to "set him up" with a young woman who had a child. Soon thereafter, they introduced him to Pepper, newly divorced from Steve G. At first, Yoshisato paid a lot of attention to Felicia, but after they moved in with him, he got progressively more irritated with having the child around. This dislike escalated during the last two

weeks of Felicia's life, according to Yoshisato's friends and roommates.

William Rhoads, Yoshisato's former father-in-law, shared visitation with Yoshisato during June 1990 of three-year-old Kai. Even though Kai lived in Illinois, Rhoads took great efforts to maintain frequent contact with him: He drove to Illinois once a year, and flew the boy back to California once a year. During the visit in June 1990, Rhoads became concerned after Kai spent the night with Yoshisato: Kai appeared withdrawn and would become rigid whenever Yoshisato would arrive to get the boy for visitation. Moreover, Rhoads noticed Kai became very constipated *after* the overnight visit with Yoshisato.

A child sexual abuse expert, Dr. Deborah Stewart, examined Kai on July 19, 1990 and found a healing tear in the rectum, consistent with blunt force trauma. In her opinion, such an injury was not caused by constipation or any natural occurrences. It was consistent with the findings on children who have been sexually abused. She concluded that someone had forcibly penetrated the anus with either a finger or a penis, a violation which would have resulted in screams or cries when inflicted. She also opined that sexually abused children often became constipated after an abuse episode as it was terribly painful for them to relieve their bowels with a healing injury.

Dr. Stewart reviewed the medical reports and examined the photographs of the genitals of Felicia following her death. The injuries noted were solely and completely caused by extreme, repeated physical and sexual abuse, of a kind and degree that would have resulted in screams

of pain by the child when they were inflicted. She compared the anal injuries of both Felicia and Kai and concluded they were committed similarly.

Yoshisato talked to the police soon after Felicia's death. He gave inconsistent statements regarding how and when he bathed, dressed or disciplined Felicia. He admitted that he alone bathed Kai during his visit, during which Kai cried. He then contradicted himself on who spanked Felicia, how and when he hit her, and then accused Pepper of injuring the child. Towards the end of the interview, he admitted he got angry whenever she cried, being particularly sensitive to its irritating effect. He also admitted jerking her around, throwing her into the crib, shaking her violently, but only hitting her accidentally, such as when she hit her head on the car doorsill as he removed her from the baby seat. When the officers confronted him with the grotesque injuries found on the child, he started crying and said, "You're convincing me already that I killed her." The officers countered by asking him if it was the truth. He said it was; but he continued to deny sexually abusing her. At trial, he testified he never hurt either Felicia or Kai, that Pepper improperly struck the child and said on more than one occasion that she wished to be free of the child. He also denied the admissions made to the police.

DISCUSSION

I

Sufficiency of Evidence of Identity

Yoshisato argues there was no credible evidence "of solid value" connecting him to the crime, citing the

dissenting opinion of Justice Mosk in ***People v. Perez*** (1992) 2 Cal.4th 1117 at page 1133. He asserts that nothing but speculation supports his conviction as the perpetrator, and proposes that both Pepper and Steve had just as much motive and opportunity to inflict the wounds as him.

"Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – from which a reasonable trier of fact could find that the defendant [murdered] beyond a reasonable doubt. [Citations.] The standard of review is the same in cases such as this where the People rely primarily on circumstantial evidence. [Citation.] Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, *it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt.* If the circumstances reasonably justify the trier of fact's findings, *the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.* [Citation.]" (**Perez, supra,** 2 Cal.4th at p. 1124, internal quotation marks omitted and emphasis added.)

Direct evidence is not necessary to support a conviction. (See CALJIC No. 2.00 ["It is not necessary that facts be proved by direct evidence. . . . "].) The testimony that little Felicia lost consciousness only when left alone with Yoshisato, coupled with his own statement to Flores that he might kill the child, Kane's and Holland's overhearing

the child's cries and the rapid slapping sounds while Yoshisato was alone with Felicia behind closed doors, and his admission that his violent disciplinary conduct caused the death is sufficient to support the jury's conclusion that he inflicted the fatal blows. The autopsy doctor's estimates of the hours in which certain injuries were made were sufficiently certain to include those times Yoshisato was alone with the child. In particular, the most lethal shaking occurred at a time when *only* Yoshisato had contact with the child. And *only* Yoshisato said he would kill the child. And *only* Yoshisato's family tried to persuade witnesses to give false testimony so as to cast suspicion on others' possible guilt. And *only* Yoshisato gave totally inconsistent statements as to what violent acts he committed on the baby. Had the murder victim been an adult, these facts would clearly support Yoshisato's conviction for murdering her.

Both experts agreed that the wounds, either alone or in combination, caused the death; it was only uncertain as to which of the types of wounds – blunt force beatings or the severe shaking – had the greatest or most recent lethal impact. The evidence is sufficient to support the logical inference that Yoshisato was the perpetrator of the fatal injuries.[5] (Cf. ***People v. Price*** (1991) 1 Cal.4th 324, 462, fn. 21.)

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[5] We purposely failed to include the allegation that Yoshisato committed a lewd and lascivious act on his own son, Kai, as it is unclear if the jury found he committed the act at all. We discuss the issue of its admissibility in part II, ***infra.***

II

Other Crimes Evidence

Yoshisato argues that the evidence indicating someone may have sexually abused his son, Kai, was improperly admitted in his trial. Considering the highly inflammatory implication that he did it, he contends he was denied a fair trial.

The jury was instructed that it must first determine if the defendant committed the prior act – by a preponderance of the evidence – before it could then consider it for its limited purpose. (See CALJIC Nos. 2.50, 2.50.1, 2.50.2 (1988 vol.).)[6] Thus, his fear that the jury *might* have

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[6] The court instructed the jury as follows: "Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial. *Before you may consider this evidence, you must first determine that the prior offense occurred and that the defendant committed that offense.* [¶] Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show the identity of the person who committed the crime, if any, of which the defendant is accused. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose. [¶] Within the meaning of the preceding instruction, such other crime purportedly committed by a defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that the defendant committed such other crime. . . . [¶] The prosecution has the burden of proving these facts by a preponderance of the evidence. [¶] Preponderance of the evidence means evidence

convicted him of the offense merely on the *implication* that he committed the molestation of Kai is unfounded. The jury had to conclude that he actually committed the molestation before it could consider this event in terms of the charges involving Felicia at all.[7]

Other crimes evidence is inadmissible to prove a criminal defendant's character or propensity to commit crimes. (Evid. Code, § 1101, subd. (a).) It is, however, admissible to show that the defendant had a motive, opportunity, intent, plan, or special knowledge, or to prove his or her identity as the perpetrator. (Evid. Code, § 1101, subd. (b).) In this case, the evidence was admissible to prove motive, opportunity and plan.

The test to admit other crimes evidence was recently explained and delineated in ***People v. Ewoldt*** (1994) 7

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that has more convincing force and a greater probability of truth than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue. . . . preponderates, your finding on that issue must be against the party who had the burden of proving it." (See CALJIC Nos. 2.50, 2.50.1, 2.50.2, as given, emphasis added.)

[7] It is irrelevant that a judge granted a motion under Penal Code section 995, resulting in the dismissal of the actual counts accusing Yoshisato of molesting Kai. (E.g., ***People v. Davis*** (1995) 10 Cal.4th 463, 513 [although charges that Davis raped a victim were dismissed under Pen. Code, § 995, evidence concerning the rape was admitted and the jury properly instructed that, should it find Davis raped the victim and then killed her, he was guilty of felony murder during rape.].) And, as questioned in ***Davis***, Yoshisato was fully informed he would be facing the evidence of Kai's molestation because the court, in granting the section 995 motion, informed him that the evidence could still be admitted at trial for other purposes.

Cal.4th 380 and ***People v. Balcom*** (1994) 7 Cal.4th 414. In overruling its decision in ***People v. Tassell*** (1984) 36 Cal.3d 77, the court announced that other-crimes evidence was admissible *to establish* the defendant had the same plan in mind on both occasions. This admissibility, however, was conditioned on whether the uncharged misconduct "share[d] sufficient common features with the charged offenses to support the inference that both the uncharged misconduct and the charged offenses [were] manifestations of a common design or plan." (***Ewoldt, supra,*** 7 Cal.4th at p. 403; ***Balcom, supra,*** 7 Cal.4th at p. 418.)

As explained in ***Ewoldt,*** such evidence has a tendency to prove that the defendant committed the charged act because he has done the same thing before (or since). This reason distinguishes it from such evidence that proves intent – when the act is concededly done, but the intent with which it is done is disputed – or identity, where the manner of accomplishing both acts is so identical as to reveal a signature method, and thus, the identity of the perpetrator. (***Ewoldt, supra,*** 7 Cal.4th at p. 394, fn. 2.) Evidence of a common plan was further described as "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (***Id.,*** at p. 393.)

The court then laid out the test for determining the admissibility of such evidence. "[T]he uncharged offenses committed by defendant [must] . . . share features in common with the charged offenses sufficient to support the inference that the uncharged acts and the charged offenses were manifestations of a common design. . . . [¶]

To be relevant, the plan, as established by the similarities between the charged and uncharged offenses, *need not be distinctive or unusual.* Evidence that the defendant possessed a plan to commit the type of crime with which he or she is charged is relevant to prove the defendant employed that plan and committed the charged offense. . . . [E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. . . . [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]" (***Balcom, supra,*** 7 Cal.4th at p. 424, citing ***Ewoldt, supra,*** 7 Cal.4th at p. 403, emphasis added.)

In ***Balcom,*** a man was charged with rape in California which had occurred before he absconded to Michigan where he raped another woman and was convicted. In the California trial, evidence of the Michigan incident was held properly admitted as indicating a common design or plan. The court focused on the following marks of similarity between the two situations in that analysis: (1) the two incidents occurred only six weeks apart; (2) the rapist wore dark clothing and a cap; (3) he sought out a lone woman in the early morning in an apartment complex; (4) he gained control over her by using a gun; (5) he initially voiced only an interest in robbing her; (6) he removed her to an isolated area; (7) after moving her, he disrobed her and raped her; and finally, (8) he took her ATM card and car. (***Id.*** at p. 424.)

In the case at bar, Yoshisato gained total and isolated control over a child of such tender years that he or she could not tell others of what happened. In both cases, Yoshisato held a special position of trust, being the natural father of Kai and the de facto stepfather of Felicia. In both cases, he assumed bathing responsibilities over both preverbal children, and insisted that no one else be present. In both cases, Yoshisato took each child behind closed doors when he committed the acts: Kai was taken into a closed bathroom to bathe, and was heard to be crying while there; and Felicia was taken into the same bathroom as well as a bedroom, during which time her cries were also heard. The same site was used in both situations. As the child sexual abuse expert testified, both children suffered the same *type* of blunt force trauma to the anus, having been penetrated by either a finger or penis, although Felicia evidenced chronic abuse while Kai had a single injury. Both children's injuries occurred in the same two-week period of time. This period coincided with Yoshisato's exhibiting extreme tension around children and undue irritation with a child's crying, as his friends and family observed. Both children exhibited fear and apprehension after these enclosed bathing sessions with Yoshisato, yet displayed no such fear towards others who had bathed them. With these similarities, the trial court could rationally infer that the defendant "employed the [same] plan" when he committed each of the acts.

Recently, the admission of a prior incident of child sexual abuse was held admissible in a subsequent molestation trial. In ***People v. Dancer*** (1996) 45 Cal.App.4th 1677, the trial court admitted an earlier molestation incident which occurred 10 years before the

charged event. In the earlier incident, Dancer baby-sat the 13-month-old baby of his roommates. Returning to the home before their expected arrival time, the mother found Dancer lying on her bed with the baby positioned next to his groin. His pants were unzipped and his penis exposed. It appeared that Dancer was attempting to place it in the baby's mouth. This incident was admitted in a trial for a series of lewd acts against a four-year-old girl who resided with her mother in an apartment above that belonging [sic] to Dancer. In upholding the trial court's decision, the appellate court noted that to establish a common plan or design, " 'the common features [between the uncharged and charged acts] must indicate the existence of a plan rather that [sic] a series of similar, spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense.' " (***Dancer, supra,*** 45 Cal.App.4th at p. 1689.) The court noted the "marked dissimilarities" between the earlier incident and the charged event, but concluded the "common features" reasonably supported the inference that each incident was a manifestation of a common plan, irrespective of the alternative opinion based on the dissimilarities. The court focused on the fact that Dancer lived "near" each of the victims, acquainted himself with the victim through the child's parents, selected victims of very young age, and either baby-sat them or was entrusted with their care. He committed the acts in places hidden from public view. In each case, he exposed his penis to the victims and attempted to have them orally copulate him. When

confronted by the mother of each of the victims, Dancer responded very calmly and removed himself.

Almost every fact noted in ***Dancer*** to uphold the admission is present in the case before us, with the only difference being the ultimate crime committed by Yoshisato was much more heinous. And the uncharged incident was much less egregious than that actually charged against him, nullifying any argument of prejudice caused by presenting evidence of a more inflammatory crime than that actually charged. (See ***People v. Rose*** (1996) 46 Cal.App.4th 257, 264-265 [three girls testified that Rose attempted to sexually touch them; Rose was prosecuted for committing a series of lewd acts on another 12-year-old].)

The trial court ruled that the evidence was admissible to prove identify, but the marks of similarity were *not* so distinctive and numerous as to support that ground. Pursuant to ***Ewoldt***, the greatest degree of similarity is required for admission of evidence to prove identity. (***Ewoldt, supra,*** 7 Cal.4th at p. 403.) However, we must uphold a trial court's evidentiary ruling if, upon any legal rationale, the ruling is correct. (See ***In re Baraka H.*** (1992) 6 Cal.App.4th 1039, 1045.) For purposes of proving motive, opportunity, knowledge and a common plan,[8] the

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[8] At trial, the defense argued that no sexual intent was ever harbored by Yoshisato when he touched Felicia's genitals. As such, this other crimes evidence was admissible to prove intent as well, which under ***Ewoldt***, requires a lesser degree of similarity as that to prove common design. (***Ewoldt, supra,*** 7 Cal.4th at pp. 402-404.) However, the question is whether the evidence was admissible at all, not whether there were multiple grounds for its admission.

evidence was properly admitted. Particularly because such grounds, although not evidence of a signature method as to prove identity, are logically related to the perpetrator's identity.

After a determination that admission is statutorily appropriate, the court must then decide if the evidence's prejudicial effect – if any – outweighs its probative value. (Evid. Code, § 352.) In Yoshisato's case, there was not a joining of a weak case with strong evidence of uncharged acts; both situations were weighted almost identically in being circumstantially proven. The other crimes evidence was not of an inflammatory nature as compared with the actual charges; *both* are of a heinous type. He contends, however, that the jury must have impermissibly used the mere accusation that he molested Kai to convict him of the sexual offenses against Felicia without first determining that he actually committed these acts or to punish him for the uncharged acts. But the jury was properly instructed that it had to find the evidence proved he molested Kai by a preponderance before it could use it for *any* purpose, and it could not use such evidence for an impermissible purpose. We must accept that the jury followed the instructions given it. (***People v. Morris*** (1991) 53 Cal.3d 152, 217-218.)[9]

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[9] Because we hold that the jury could permissibly conclude that evidence of Kai's molestation was relevant and material to the present charges, Yoshisato's final contention of a due process denial need not be addressed. (See ***McKinney v. Rees*** (9th Cir. 1993) 993 F.2d 1378, 1384 [if no permissible inference can be drawn from other crimes evidence, federal due process is violated].)

III

Exclusion of Others' Motive and Opportunity

Yoshisato contends he was denied a potentially meritorious defense of showing that either Pepper or Steve were the more likely perpetrators. This denial, he alleges, was accomplished by the exclusion of certain evidence: (1) Steve's motivation to lie; (2) Steve's prior cocaine use; (3) Steve's vindictive and violent state of mind towards Yoshisato and Pepper during their relationship; (4) Pepper's true dislike of Felicia; (5) the nonexistence of any material instinct in Pepper; (6) Pepper's apathetic reaction to Felicia's unconsciousness. We note the Pepper's statement to Yoshisato about wishing to be rid of her *was* admitted, and the paramedic testified that Pepper appeared unduly apathetic to Felicia's apparent death. All the evidence of Pepper's physical abuse of Felicia was likewise admitted, as well as instances of negligence, either through Yoshisato's own testimony or through defense witnesses. Additionally, Pepper admitted spanking Felicia severely after removing her diaper on the evening of her death. We also note the jury was told of Steve's misdemeanor conviction for theft, his anger towards – and hatred of – Yoshisato, his stated desire to kill Yoshisato for causing his daughter's death, Steve's previous threats to do bodily harm to Yoshisato, Steve's violent temper and tempestuous relationship with Pepper, Steve's filing a lawsuit against Yoshisato after Felicia's death, and Steve's denial that he was under the influence of drugs during his testimony. Considering all of these facts indicating the immaturity, irresponsibility, inappropriateness, negligence and unnecessary harshness exhibited by Felicia's natural parents, we are hardpressed

to understand how the one remaining incident which was excluded resulted in any prejudice. That one incident involved defense counsel's desire to tell the jury that Steve once threatened to kill Yoshisato if the jury failed to convict him. As the court declared in its ruling, the threat was directed more towards the jury, implying that it had to reach a verdict agreeable to Steve or he would do something that would make the individual jurors feel guilty. Thus, its exclusion was appropriate and not arbitrary, capricious, or patently absurd, the definition of an abuse of discretion. (***People v. Jordan*** (1986) 42 Cal.3d 308, 316.) A trial Court's evidentiary ruling must be upheld on appeal unless it is shown to be of such an insupportable nature. (***Ibid.***; Evid. Code, § 354.) No error occurred here.[10]

IV

Jury Instructions

A. Premeditation and Deliberation Instruction

The court instructed the jury that the definition of premeditated murder was that "perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought. . . . [¶] The word 'willful' as used in this instruction, means intentional. [¶] The word

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[10] Yoshisato also contends that certain evidentiary rulings during cross-examination of Flores and Brent Holland deprived him of a fair trial. However, this deprivation resulted from the cumulative impact of *all* the alleged evidentiary errors, not just those involving Flores and Holland. As no error occurred in the more fundamental evidentiary rulings, no cumulative harm was brought by the minor ones.

'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word, 'premeditated' means considered beforehand. [¶] If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. . . . "[11] (See CALJIC No. 8.20.) Yoshisato contends this was error, alleging the evidence was insufficient to meet even the foundational requirement to support this prosecutorial theory and instruction.[12]

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[11] The instruction continued, further describing and clarifying this definition as follows: "The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. [¶] The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. [¶] To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he [ ] decides to and does kill." (CALJIC No. 8.20.)

[12] We note that even if the trial court erred when it instructed the jury on a factually deficient theory of murder, reversal is not required as long as evidence exists to support the

"It is black letter law the trial court must instruct the jury on every theory of the case which is supported by substantial evidence. [Citations.]" (***People v. Glenn*** (1991) 229 Cal.App.3d 1461, 1465.) Thus, the question is whether substantial evidence was present to support the prosecution's request for the instruction, relying as it did on premeditated and deliberate murder as one of its theories to prove its first degree murder charge.

The evidence was that Yoshisato hated Felicia, becoming progressively more irritated and frustrated with her presence and crying. Three days before her death, he told another man in hushed tones that he might kill the child because of it. He injured her so severely on one occasion that she lost consciousness and vomited; the second time he did it, she never awakened. The three-day interval between the two injuries was more than ample for him to adequately reflect and consider the seriousness of his conduct. The different types of injuries inflicted were all of such an extreme kind that only severe injury if not death could have been intended. He admitted to shaking her, jerking her around and throwing her into her crib so hard that it broke the leg of the bed. Additionally, there was a *pattern* of such heinous conduct, over the course of five days but especially concentrated on the evening of her death. Thus, Yoshisato had many opportunities to reflect on the harmful acts before inflicting

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conviction under another theory, and the record does not affirmatively show the jury relied on the improper grounds. (See ***People v. Guiton*** (1993) 4 Cal.4th 1116, 1128-1129.) As we hold the evidence sufficient to support the instruction, we need not rely on this approach.

them a second, third, or fourth (much less a tenth) time.[13] Throughout this period of beatings, Yoshisato never once sought medical aid for the child until after she actually expired, even though he saw the increasingly severe harm suffered by the child at his hand. This evidence was sufficiently substantial to support the premeditated murder instruction, reflecting – as it does – a person who has plenty of time between each of his acts of lethal violence to refrain from inflicting the fatal blow (e.g., ***Perez, supra,*** 2 Cal.4th a pp. 1126-1127),[14] or obtaining aid to prevent

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[13] The autopsy showed Felicia had suffered 10 or 11 distinct blows to her head within 12 hours of death, in addition to the harm from the violent shaking which produced the optic nerve damage.

[14] We refrain from entering the academic discussion – invited by Yoshisato – that the evidence fails to meet the appellate guidelines delineated in ***People v. Anderson*** (1968) 70 Cal.2d 15, 27 for review of a premeditated murder conviction on appeal. Such a review is appropriate when, on appeal, the evidence is attacked as insufficient to sustain the conviction. But Yoshisato has not attacked the sufficiency of the evidence per se. He is only attacking the sufficiency of the evidence to support the court's charging the jury with the premeditation and deliberation theory for the murder count. And the ***Anderson*** guidelines are reserved only for appellate review of the sufficiency of the evidence for the first degree finding, not for other purposes and are not exhaustive. (See ***Perex, supra,*** 2 Cal.4th at p. 1125.) Yoshisato's description of ***Anderson*** as a case standing for reversal on the basis of instructional error is inaccurate: The appellant attacked the premeditation finding as having insufficient evidence to support it. The opinion recites the charges for which the court informed the jury as to the necessary definitions, but *instructional error was never considered,* much less addressed. (***Id.*** at pp. 23-25.) Counsel may have confused this ***Anderson*** opinion with an earlier opinion dealing with the same defendant for the same crime. A reversal was

the death from the coup de grace administered by himself. (E.g., ***People v. Ainsworth*** (1988) 45 Cal.3d 984, 1023 [" . . . since defendant obviously knew of the victim's injury, he had – by continuing to keep her captive – knowingly and intentionally deprived her of access to medical care while she bled to death."].) Finally, his own words blocked Pepper's acting on her concerns for the child: She was worried about the child's loss of consciousness until he allayed her fears, saying another child often passed out of his own volition whenever he failed to get his way. With such significant evidence in the record, the court would have erred had it *not* given this instruction.

B. Murder by Torture

The trial court also charged the jury with the legal definition of first degree murder by torture: "Murder which is perpetrated by torture is murder of the first degree. [¶] The essential elements of murder by torture

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ordered in ***People v. Anderson*** (1965) 63 Cal.2d 351, 360 on the basis the trial court should never have charged the jury with the definitions of murder in the perpetration of mayhem or murder by means of torture as the evidence was insufficient for those possible crimes. (***Id.*** at pp. 358-360.) Anderson was then retried for the same set of facts and found guilty of premeditated and deliberate murder. On appeal, that conviction was reduced to second degree murder for insufficiency of evidence of premeditation and deliberation, the court noting that the record was devoid of evidence of "planning," "motive," or the "manner" indicating a preconceived design to kill. (See ***Anderson, supra,*** 70 Cal.2d at pp. 25-27.) However, that reversal did not address instructional issues at all, only the sufficiency of the evidence to sustain the conviction.

are: [¶] 1. One person murdered another person, and [¶] 2. The perpetrator committed the murder with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose, and [¶] 3. The acts or actions taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death. [¶] The crime of murder by torture does not require any proof that the perpetrator intended to kill his victim, or any proof that the victim was aware of pain or suffering. . . . " (CALJIC No. 8.24 (1992 Revision).)[15]

Relying on ***People v. Steger*** (1976) 16 Cal.3d 539 – in which a torture murder conviction was reduced to second degree murder of a battered child – Yoshisato contends there was no evidence that (1) he intended to inflict extreme and prolonged pain, and (2) his acts, if they were intended to inflict pain, caused the death of Felicia. Noting that the victim in ***Steger*** was a three-year-old child, killed by her stepmother through a series of beatings over the course of a month, Yoshisato compares his situation with that of Steger and argues the holding in ***Steger*** must be applied to him.

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[15] The instruction continues by defining the "word, 'willful' as used in this instruction means intentional. [¶] The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. [¶] The word, 'premeditated' means considered beforehand." (CALJIC No. 8.24 (1992 Revision).)

As was recently stated in ***People v. Raley*** (1992) 2 Cal.4th 870, torture murder "is murder committed with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain. [Citations.] The culpable intent is one to cause pain for the purpose of revenge, extortion, persuasion or for any other sadistic purpose. [Citations.] [¶] The intent to inflict extreme and prolonged pain may be inferred from the circumstances of the crime. [Citation.] On the other hand, we have cautioned against giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an explosion of violence, as with the intent to inflict cFlores suffering. [citation.]" (***Id.*** at p. 888, internal quotation marks omitted.)

On appeal, we review the evidence in the light most favorable to the verdict, irrespective of an appellant's contrary protestations. For instance, Yoshisato contends the only evidence indicating motive was that he intended to discipline the little girl, and was unaware that severe discipline can harm a 13 month old. We find this excuse rather unpersuasive: Any normal human being knows that forcible sodomy and rape on an infant who is screaming in pain is harmful. (See also ***People v. Pensinger*** (1991) 52 Cal.3d 1210, 1239-1240.)[16] Likewise,

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[16] In ***Pensinger***, which involved the torture of a five-month-old girl, the defendant argued insufficient evidence to sustain an intent to inflict torture as he said he struck and slashed the child to stop her from crying. The court rejected this self-serving excuse, finding "that the evidence was sufficient to allow a jury to conclude that defendant had made incisions on the child while she screamed and that he was aware of her pain but

throwing an infant into a crib with such force that the crib breaks a leg in the process is force of such kind as well as degree to indicate an intention to harm. Unlike Steger, Yoshisato could have removed himself from the situation altogether, leaving the child with Pepper. Instead, he *chose* to take her alone behind closed doors each of the times he inflicted the beatings that resulted in her unconsciousness. This situation is more akin to that in *Raley* in which the jury's finding of torture murder was upheld: "Here, . . . , defendant inflicted 41 knife wounds on [the victim], while she screamed. He also inflicted a crushing blow to her skull. The jury could reasonably conclude that this series of painful injuries was calculated to cause grievous, prolonged pain. [Citation.] Defendant points to no evidence that [the victim] offered resistance or provocation and there was no evidence of intoxication. Thus the claim that the attack was an unpremeditated explosion of violence is unpersuasive." (*Id.* at p. 889.)

Likewise, here. The jury had the choice of believing him in his explanation that he only intended to discipline the child and that he was unaware that his conduct could severely harm her. The jury rejected that option, finding that he inflicted the sexual abuse as well as the physical abuse. With that finding, his explanation of mere discipline became incredible: No one "disciplines" an infant

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continued to inflict it intentionally over a considerable period. The jury could infer a sadistic intent to give pain to punish her for crying. The evidence gave further ample support for an inference of a sadistic aspect to the infliction of the injuries, given the testimony regarding attempts to orally copulate or otherwise molest the child before death. . . . ***Pensinger, supra,*** 52 Cal.3d at p. 1240.) The same thing could be said here.

with sexual crimes. (See e.g., ***Pensinger, supra,*** 52 Cal.3d at p. 1240.) The jury was quite entitled to reject his self-serving explanation for such conduct.[17]

Similarly, his insistence that all injuries not directly fatal cannot be considered in this equation is rejected; it is the totality of circumstances which must be examined. (***Proctor, supra,*** 4 Cal.4th at pp. 530-531 ["The acts of

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[17] The forensic testimony, augmented by that of the child sexual abuse expert, was overwhelming in its description of the extreme pain Felicia suffered when her wounds were inflicted. The details need not be repeated: The child's screams *the first time* the injuries were imposed would have been sufficient warning to anyone that the child was undergoing extreme and unwarranted pain. The fact these very acts were then repeated over and over in the course of one evening is sufficient evidence that a reasonable trier of fact could draw the conclusion Yoskisato intended Felicia to needlessly suffer. (Cf. ***People v. Proctor*** (1992) 4 Cal.4th 499, 530-531 [multiple wounds, including some that failed to lead to death, were properly considered along with those that were directly fatal, as all circumstantial evidence should be considered in a torture murder or torture murder special circumstance finding]; ***People v. Crittenden*** (1994) 9 Cal.4th 83, 104-141 [pathologist's testimony of inevitable pain from the type and severity of wounds sufficient to sustain finding of torturous intent].

We note the difference between torture murder for a first degree murder finding, as distinct from torture murder for special circumstances: the first requires no specific intention to kill, while the latter one does. (***People v. Mincey*** (1992) 2 Cal.4th 408, 432; ***People v. Davenport*** (1985) 41 Cal.3d 247, 271; see also Pen. Code; § 190.2, subd. (a)(18).) Thus, the jury clearly rejected Yoskisato's protestations of an innocent, albeit harming, intent: It found he not only inflicted the beatings for the sheer purpose of making Felicia suffer, but did so as well with the intention that she die.

torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture. . . . "]; see also ***People v. Jenkins*** (1994) 29 Cal.App.4th 287, 299-300 [" 'like child abuse, [spousal battery] is a case where each individual act may not amount to a crime, but the cumulative outcome is [torture]. . . . ' ") It is unquestionable that Felicia died from a combination of the blunt force blows to the head and the severe shaking; these wounds were occasioned at approximately the same time as certain of the sexual offenses, based on the experts' assessments of when and how they occurred. As such, *all* the different types and degrees of harm perpetrated on Felicia by Yoshisato were part of the "continuous course of conduct" which ultimately resulted in death.

The torturous intent is evidenced, not just from the severe injuries on Felicia, but also from Yoshisato's statement that he hated the child for crying and his progressively more cFlores conduct to her. Initially, he showed her a lot of attention. Then, he started making faces at her to scare her. He habitually yelled at her to intimidate her. He would sneak up behind her to frighten her. On a later occasion, he turned the water on full strength leading to a hose which he saw she had just picked up and put to her mouth. Eventually, he beat her, penetrated her genitals repeatedly and shook her to death. If that is not a tortured death of an infant, nothing is.

C. Felony-Murder Instruction

Yoshisato similarly argues that insufficient evidence supported the giving of the jury instruction defining first degree felony murder: a murder committed in the perpetration of the forcible penetration crimes. However, discussion of the issue becomes truly academic as the instructions for the first degree finding on the previously discussed, two grounds were proper. Thus, any error, if error there was,[18] was harmless. (Cf. ***People v. Guiton, supra,*** 4 Cal.4th at p. 1131; see also fn. 12, ***infra.***)

D. Failure to Give Accomplice Instruction

Yoshisato contends the court created reversible error by failing to instruct sua sponte that Pepper was, or potentially could be found an accomplice to the charges. If so, then the jury was to view her testimony with distrust. (Pen. Code, § 1111; see CALJIC Nos. 3.10-3.16.)[19]

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[18] It appears there was no error. For felony murder, the acts constituting the underlying crime need not *cause* the death as long as the intent for the underlying felony is harbored prior to or during the acts resulting in death. (***People v. Ainsworth*** (1988) 45 Cal.3d 984, 1016.) In other words, the felony and the acts resulting in the death must occur within one continuous transaction. (***Ibid.***) Here, the sex offenses and the head injuries occurred at the same time: when Yoskisato took the child and kept her alone behind closed doors. (See e.g., ***People v. Thompson*** (1990) 50 Cal.3d 134, 171 [the sodomy of a young boy and his murder two hours later met requirements of felony murder].)

[19] Penal Code section 1111 states "A conviction cannot be had upon the testimony of an accomplice unless it be

The prosecutor argued that the jury was not to consider anything about Pepper's potential culpability for failing

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corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." CALJIC No. 3.10 states that "[a]n accomplice is a person who is subject to prosecution for the identical offense charged in [the information] against the defendant on trial by reason of aiding and abetting or being a member of a criminal conspiracy." CALJIC No. 3.11 states "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence that tends to connect such the defendant [*sic*] with the commission of the offense. . . . " CALJIC No. 3.12 states, in pertinent part, "[t]o corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged. [¶] However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies. [¶] In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime. [¶] If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated. . . . " CALJIC No. 3.13 states "[t]he required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence." CALJIC No. 3.16 states that "[i]f the crime of ___ was committed by anyone,

to protect her daughter from Yoskisato, and the court instructed the jury that Yoskisato was guilty if he caused the death of Felicia, even if another cause also contributed to it. (See CALJIC No. 3.41, as given.)[20] However, instruction on accomplice testimony must be given sua sponte if credible evidence supports the need for it. (Pen. Code, § 1111; ***People v. Gordon*** (1973) 10 Cal.3d 460, 470.) Failure to give it is error but harmless where, as here, ample evidence from other sources corroborates the witness's testimony. (***People v. Arias*** (1996) 13 Cal.4th 92, 143.) Practically all of Pepper's crucial testimony was corroborated by Yoskisato's roommates, Flores, or the medical testimony. Pepper's failure to protect her child from Yoskisato's violence – or even her own conduct – became insignificant as an instructional issue in light of that corroboration.

The judgment is affirmed.

SILLS, P.J.

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the witness ___ was an accomplice as a matter of law and [his or her] testimony is subject to the rule requiring corroboration."

[20] CALJIC No. 3.41, as given, stated "[t]here may be more than one cause of the death of Felicia Grunbaum. When the conduct of two or more persons contributes concurrently as a cause of the death of Felicia Grunbaum the conduct of each is a cause of the death of Felicia Grunbaum if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the death of Felicia Grunbaum and acted with another cause to produce the death of Felicia Grunbaum. If you find that the defendant's conduct was a cause of death to another person, then it is no defense that the conduct of some other person contributed to the death."

WE CONCUR:

WALLIN, J.

CROSBY, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WAYNE ICHIJI YOSHISATO, Defendant and Appellant.	G016761 (Super. Ct. No. C83329) MODIFICATION ON DENIAL OF PETITION FOR REHEARING; NO CHANGE IN JUDGMENT (Filed Jun. 10, 1997)

It is hereby ordered that the opinion filed on May 23, 1997 in this appeal be modified as follows:

1. On page 2, the first sentence of the first paragraph following the title, "FACTS," should read: "Little Felicia G. died at the hands of someone who beat and shook her to death, sexually torturing her during the process."

2. On page 15, footnote 9 should read: "Because we hold that the jury could permissibly conclude that evidence of Kai's molestation was relevant and material to the present charges, Yoskisato's final contention of a due process denial need not be addressed. (See ***McKinney v. Rees*** (9th Cir. 1993) 993 F.2d 1378, 1384 [if no permissible inference can be drawn from other crimes evidence, federal due process is violated by its admission.].) We note in that regard, however, that the trial court here determined

that the other crimes evidence was *not* unduly prejudicial when it conducted its weighing under Evidence Code section 352. Therefore, the fear that the evidence was so prejudicial as to render the trial fundamentally unfair is unfounded. (Cf. ***Jammal v. Van de Kamp*** (9th Cir. 1991) 926 F.2d 918, 919-920.)"

3. On page 20, in the last full line of the second paragraph, the letters, "Flores" should be replaced with "cruel."

4. On page 22, the third line of the second paragraph includes the letters, "Flores," which should be replaced with the word, "cruel."

This modification does not effect a change in the judgment. The petition for rehearing or modification is denied.

SILLS, P.J.

WE CONCUR:

WALLIN, J.

CROSBY, J.